UNITED STATES CIRCUIT COURT OF APPEALS,

NINTH CIRCUIT.

No. 48

SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,

vs.

ASA M. HAMILTON, DEFENDANT IN ERROR.

BRIEF FOR THE PLAINTIFF IN ERROR IN REPLY.

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H.S.CROCKER COMPANY, S.F.

IN THE

United States Circuit Court of Appeals,

NINTH CIRCUIT.

SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

vs.

ASA M. HAMILTON,
Defendant in Error.

Brief for the Plaintiff in Error in Reply.

The facts bearing upon the question of dismissal of the writ of error herein are:

On November 14, 1891, before the jury retired to consider their verdict, the defendant, upon the suggestion of the Court, wrote out its exceptions and filed them with the clerk.

The verdict was rendered by the jury on the same day.

On the sixteenth judgment was entered by the Clerk upon the verdict for $44,750.

On the twenty-first the defendant served and filed its notice of motion for new trial, specifying the grounds and errors upon which it would rely.

The Court left for San Francisco, and the motion was brought up, argued and submitted to the Court upon its return, February 3, 1892, and the motion granted unless plaintiff would consent to reduce the judgment to $15,000, which he thereupon did.

On February 6th the company filed its petition for allowance of a writ of error containing full assignment of error, and on the same day (February 6th) the Court ordered that execution be stayed upon the company filing a supersedeas bond in the sum of $20,000.

On February 15th the bond was made and was approved by the Court.

On February 20th the Court ordered that the company have until and including March 22d within which to serve and file its bill of exceptions.

On March 12th the bill of exceptions containing all that the company relies upon here was served and filed.

On March 21st the Court settled and signed the bill.

As the defendant excepted to the competency and sufficiency of the evidence to justify the Court in submitting the question to the jury as to whether Eugene Cozzens acted as an officer or agent of the company in making the arrest, the bill set out all of the testimony in order that the facts upon which the instruction was founded might be presented for examination.

But it does not appear to us that the argument contained in the first six pages of the brief for the defendant in error directed to the dismissal of this writ of error can be considered, for the reason that it is not based upon any motion directed to the point, reduced to writing and filed with the Clerk or served upon the plaintiff in error or its counsel.

Rule 21 of this Court provides that:

" 1. All motions shall be reduced to writing, " and shall contain a brief statement of the facts " and objects of the motion.

" 3. No motion to dismiss, except on special " assignment of the Court, shall be heard, unless " previous notice has been given to the adverse " party, or the counsel or attorney of such " party."

There was no assignment by the Court of this matter, no motion of any character, and no

notice of defendant's purpose to this end has ever been served upon the plaintiff in error.

We call the attention of the Court to the fact that on the day this writ was argued upon the merits, July 27, 1892, the attorney for defendant in error asked leave to file and serve his motion to dismiss; but the Court ruled that the motion came too late, and refused leave upon the ground that the transcript had been filed May 20th; that when the calendar was called on July 11th counsel answered "ready;" that the case had been set and stood for hearing upon the merits, and would not be disturbed to give place to a technical and dilatory motion, especially as the motion seemed to be based upon a ruling of the Court below, but did not appear to be supported by any motion made or exception taken in the lower Court.

Hence the point should not be considered.

If the defendant should rely upon certain objections to the allowance and settlement of the bill of exceptions filed by him in the Court below on the 21st day of March, 1892, the day on which the bill of exceptions and record was allowed, approved and settled, the complete answer to such a position is that those objections are no part of the record. It does not

appear they were ever presented to or considered by the Court, but if they were, then they were overruled, and the action of the Court in overruling them cannot be reviewed here, because no exception was ever filed, presented or taken.

By the practice of courts of common-law jurisdiction, collateral orders and rulings unfavorable to the party complaining constitute no part of it unless embodied in a bill of exceptions. Therefore, as a matter improperly in the transcript, the Court will disregard it.

But the defendant in error could not prevail in this matter even if he had taken the necessary steps to present it here for the consideration of the Court.

The force of his position depends upon the theory that a rigid construction must be given to an inflexible rule.

His contention is based upon three objections, which as stated are :

1. That the bill of exceptions was not prepared in form and presented to the Judge within ten days after verdict, and that unless so prepared and presented they shall be deemed waived.

2. That the Court had no authority to permit or allow a bill of exceptions after a motion for a new trial had been heard and denied.

3. That the record on appeal to the Court of Appeals must be the same record, and cannot be different from the record upon which the Court acted at the hearing of the motion for new trial.

For greater convenience we will consider the objections in the inverse order of their statement, and are confident we can make it apparent that they are purely technical and unsupported by reason or authority.

It seems evident that counsel for the defendant in error will urge that there must be a statement on motion for new trial prepared, settled and allowed, conformably to the State statute.

That the rules and practice of the State courts apply to proceedings in the Circuit Court taken for the purpose of reviewing there or later in this Court a judgment of the Circuit Court, and that consequently the plaintiff in error committed a fatal blunder in relying upon rule 23 of the Circuit Court, which provides that notices for new trials may be based and heard on the minutes of the court, the testimony taken by the Judge or reporter, the rulings made and excepted to in the progress of the trial, and the pleadings and proceedings on file in the Clerk's office.

The case of *Haley* vs. *Eureka County Bank*,

20 Nevada, 411, cannot be considered as authority upon this point. Motions for news trials, and the time and manner of taking exceptions, as well as all steps and proceedings looking to the preparation, perfecting and signing of a bill of exceptions, are matters as to which the Federal courts act independently of any statute or practice prevailing in the courts of the State in which the trial is had.

Iron Co., Petitioner, 128 U. S., 553.
Missouri Pac. Ry. Co. vs. *Chicago & Alton R. R. Co.*, 132 U. S., 191.
Preble vs. *Bates*, 40 Fed. Rep., 746.
Henning vs. *Western Union Tel. Co.*, 41 Fed. Rep., 866.

That the Court had no authority to permit or allow a bill of exceptions after a motion for new trial had been heard or denied is a statement unsupported by Federal rule, practice or adjudicated cases. It is universally held that judgments are under the plenary control of the court which pronounces them during the entire term at which they were rendered, and they may during such term be set aside, vacated, modified or annulled by that court for cause shown.

In the case of *Bronson* vs. *Schulter*, 104 U. S., 415, Mr. Justice Miller says:

" It is a general rule of law that all of the " judgments, decrees or other orders of the court, " however conclusive in their character, are under " the control of the court which pronounces them " during the term at which they are rendered or " entered of record, and they may then be set " aside, vacated, modified or annulled by that " court."

In *Preble* vs. *Bates*, 40 Fed. Rep., 74, the Court says:

" The consideration of the bill of exceptions " was unnecessary until the motion for a new " trial was decided, because that motion might " have been granted, when the exception would " fail, as a new trial would take place."

The contention that the bill of exceptions was not prepared in form and presented to the Judge within ten days after the verdict must fail from every reasonable view of the question.

A bill of exceptions embodying and specifying the error complained of was at the trial, before the jury retired, under the instruction of the Court, prepared in form and filed with the Clerk.

The order of the Court to write out and file the exceptions was equivalent to a personal presentation of the bill to the Judge for his

signature and allowance, and the subsequent proceedings show that both Court and counsel so regarded it.

No jurisdictional defect is suggested, and the presumptions are all in favor of the regularity of the steps taken. Without considering the rules of the Circuit Court for a moment, it may be said that a bill of exceptions filed during the term at which the exceptions were taken, and at which a motion for a new trial was overruled, becomes a part of the record, though the record does not show that any time was allowed for presenting the bill, and the bill itself does not show when it was presented.

Noblesville Gas and Imp. Co. vs. *Jeter*, 27 N. E. Rep., 635.

Hale vs. *Mathews*, 21 N. E. Rep., 43.

The record *and admissions* of the counsel for defendant in error in open court upon the argument do show that the bill was presented and filed within the term at which the trial was had, judgment rendered and the motion for a new trial determined, *and was allowed, settled and signed by the Judge within the time extended by order.* Even though the bill was not signed by the Judge within the term, the party presenting

it cannot be prejudiced if it was presented in time.

Wysor vs. *Johnson*, 30 N. E. Rep., 144.

The term at which the trial was had, judgment entered and motion for new trial denied, began on the first Monday of November, 1891, and continued until the third Monday of March, 1892.

The exceptions were reduced to form in writing, signed by the counsel for plaintiff in error and at the request of the Court filed with the clerk at the trial, and before the jury retired. On the 3rd day of February, 1892, the Court granted until March 22d, 1892, to file and serve the formal bill of exceptions, which was admitted upon the argument.

Such formal bill of exceptions, prepared as it appears in the transcript, was filed in the Clerk's office and served on defendant in error on the 12th day of March, 1892, and was allowed, approved and settled March 21, 1892.

If nothing appears to the contrary, and nothing does appear to the contrary in this record, it will be presumed, where the bill of exceptions is signed after the period prescribed by the rules, or even after the expiration of the term at which judgment was rendered, that it was done by

consent of parties. Counsel admit that an order was regularly made after the motion for new trial was decided, granting more time than was consumed to prepare and serve the bill, and it will hardly be denied that such an order is valid even when it extends the time beyond the term at which the trial was had.

Ex parte Bradstreet, 4 Pet., 107.

The record shows that the exceptions reserved at the trial were within a period regarded by the Judge as reasonable, and, within the term and time allowed by him, reduced to form, presented for his signature and allowed. And in such cases no waiver of the exceptions can be implied, but the bill will be regarded as signed *nunc pro tunc*, and have the same force and effect as though done at the conclusion of the trial.

Hunnicut vs. *Peyton*, 102 U. S., 354–359.

It must be borne in mind that there are not and never have been any rules of the Circuit Court relating to the removal of a case to the Circuit Court of Appeals for review. The rules were formed to regulate the practice of taking cases up to the Supreme Court, and, until the practice regulating the manner of getting before this Court is definitely settled, we do not believe

much heed will be given to objections and criticisms of the character under consideration.

In any view of the case a dismissal is not claimed upon any stronger or other ground than that the plaintiff in error did not move in the premises within the time prescribed by one of the rules of the lower court, to which we reply without confessing the fact: It is always in the power of the Court to suspend its own rules or to except a particular case from the operation when the purposes of justice require it.

U. S. vs. *Breitling*, 20 How., 252.
Dredge vs. *Forsyth*, 2 Black, 568.
Kellogg vs. *Forsyth*, 2 Black, 573.
Marye vs. *Strouse*, 5 Fed. Rep., 494.
Henning vs. *Western Union Tel. Co.*, 41 Fed. Rep., 866.
Symons vs. *Bunnell*, 20 Pac. Rep., 859.
Peckett vs. *Wallace*, 54 Cal., 147.
People vs. *Williams*, 32 Cal., 280–288.

On the Merits.

In reply to the brief of defendant in error upon the merits, it is obvious that the additional statement of facts which have been made by counsel does not in any manner change the

legal aspect of the case or militate against the position we assume, as stated in our former brief.

We there asserted, and still insist, that the Court was not justified in submitting, nor the jury in finding, that Cozzens acted in any other capacity than that of an officer, in arresting and removing defendant in error from the train, for the reason that there is no evidence to the contrary.

The authority cited, *Penn Co.* vs. *Connell*, 20th N. J., 91, we have been unable to find, as no such case is reported in 20th N. J. on either the law or equity side of the Court; but we are satisfied that no case can be found which will warrant the submission to a jury of any fact not controverted by the testimony. We do not feel called upon to follow counsel in their discussion of the abstract principles of law as to how far a passenger may resist the demands of the conductor when a compliance with such demand might subject him to personal danger of life or limb, because these questions have no relevancy to the issue here, and besides the Court instructed the jury in this case, to which no exception was taken, that "it was the duty "of the defendant in error to either sign his "ticket, pay his fare or leave the train, and

" upon his failure to do so the conductors of " the company were justified in using the neces- " sary force to remove him." This instruction became the law of this case, and was binding upon the jury regardless of what any other court might decide under similar circumstances; and hence to review cases where courts have held resistance upon the part of the passenger permissible can serve no useful purpose in the determination of this case.

It is also argued by counsel that Hamilton was on the train under color of right, upon a contract which upon its face purported to be sufficient, and was therefore not a trespasser upon the defendant's train, and that the defendant had no right to change the contract or insist upon conditions which were not required when the ticket was sold, etc., and several authorities are cited in support of this contention.

But in this respect counsel again ignore the charge of the Court to the jury, in which they were informed, as a matter of law, " that the ticket presented was not such a ticket as the defendant was bound to honor;" and this argument upon the part of our adversaries is a virtual admission that the jury disregarded the instructions, and

they now attempt to justify them in that respect by showing that the jury was right and the Court wrong.

This position, in the light of the authorities cited in our former brief, is incompatible with the due administration of legal proceedings, and cannot receive judicial sanction.

A verdict therefore against the instructions of the Court is a verdict against law.

It is next contended that the arrest and prosecution of Hamilton was instituted and carried forward by the plaintiff in error and its agents, and that therefore it is responsible in damages for such arrest and prosecution, no matter by whom the arrest was made.

This contention we might admit without in any manner affecting the issue now before this Court, and we do in fact admit that the plaintiff's arrest was ordered by the company through its agents, and that as such they swore to the complaint and prosecuted the plaintiff for the crime he committed; but it can hardly be claimed that this action is one for false imprisonment or malicious prosecution, and therefore the responsibility of the defendant for either of these causes is not the subject of adjudication now.

All that the evidence shows the officers of the company did was to state to the officer of the law, to wit, Eugene Cozzens, what the plaintiff had done, and the officer deeming it sufficient arrested him for making a felonious assault. Thereafter the agent of the company filed a written complaint against defendant in error, upon which he was prosecuted and discharged by the justice.

These facts are disclosed by the record, and are all the facts connected with the arrest. If the plaintiff saw fit to institute proceedings for malicious prosecution or for false imprisonment, the courts were open to him to pursue that course; but neither of these actions have been brought, but rather, one for the violation of an alleged contract of carriage, in which the arrest and prosecution have been put in evidence in aggravation of damages, instead of the gravamen of the action.

If the action had been for false imprisonment, the defendant could have alleged and shown:

First—That from the time of the filing of the complaint and the issuance of the warrant (which were in all and every particular regular), the same would operate as a complete justification and protection to the officer and this de-

fendant for the detention of the plaintiff under the charge.

Gelzenleuchter vs. *Niemeyer*, 64 Wis., 316
Hallock vs. *Downing*, 69 N. Y., 238.
Marks vs. *Townsend*, 97 N. Y., 590.
See also authorities cited in our former brief.

Second—That, for the arrest made before the warrant was in fact issued, the defendant could allege and show that its conductor fully and fairly stated the conduct of the plaintiff, and the grounds upon which he sought his arrest, to the peace officer who made the same, and such officer, in the exercise of a sound discretion, made the arrest, and in the consummation of which the defendant or its agents did not participate in any other manner than by stating such facts to the officer, and in such a case the defendant would not be liable.

Murphy vs. *Wolters*, 34 Mich., 180.
Gelzenleuchter vs. *Niemeyer*, 64 Wis., 320.
Vonlatham vs. *Libby*, 38 Barbour, 345.
West vs. *Smallwood*, 3 M. & W., 418.

In the latter case Lord Abinger said: "When "a magistrate has general jurisdiction over the

" subject-matter, and a party goes before him and
" lays a complaint upon which the magistrate
" makes a mistake in thinking it a case within
" his authority, and grants a warrant which is
" not justifiable in point of law, the party com-
" plaining is not liable as a tresspasser, but the
" only remedy against him is by an action on
" the case if he acted maliciously."

See also

Carratt vs. *Morley*, 1 A. & E., N. S., 18.
Barbour vs. *Rollinson*, 1 Cr. & M., 330.
Brown vs. *Chapman*, 6 Man. Gr. & Se., 365.
Langford vs. *B. & A. R. R. Co.*, 144 Mass., 431.

In the Massachusetts case last cited, the Court says: " The second count is for assault and false
" imprisonment. One of the agents of the de-
" fendant made a complaint to a trial justice
" against the plaintiff for unlawfully refusing to
" pay his fare, and the magistrate thereupon
" issued his warrant in due form for the arrest
" of the plaintiff. Neither the defendant nor any
" of its agents did anything except to enter the
" complaint. It is well-settled that when a per-
" son does no more than this he is not liable in
" trespass for the acts done by the officer in

" serving the warrant, even though the magis-
" trate has no jurisdiction to issue the warrant."

Applying these principles to the facts of this case, where the officer has power to arrest without warrant where he believes a felony has been committed, and upon a statement of the facts being made makes the arrest, the party stating the facts is not liable in an action of trespass for false imprisonment. Again, if the action had been one for malicious arrest and prosecution, the defendant could show :

First—That it was not without probable cause, which is a complete defense, even if carried on maliciously, or

Second—That there was no malice in the prosecution, or

Third—That the prosecution is not yet terminated, which must be *alleged* and *proved* in order to sustain an action for malicious prosecution.

Stewart vs. *Sonneborn*, 98 U. S., 187.

In this case there is no allegation in the complaint that the prosecution of the plaintiff under the charge referred to in the brief of counsel has yet terminated, and therefore it cannot be, under the authority above cited, maintained as an action for malicious prosecution, nor, as we have

shown, one for false imprisonment. It is simply and only an action for the violation of supposed duty, that of a contract of carriage, which the trial court decided, and so instructed the jury, did not exist; and hence the right of action by the plaintiff in this form must necessarily fail, as well as the arguments of counsel, and the authorities which they cite, which have no application to the case now before the Court, as a hasty review of them will conclusively show.

Hall vs. *Memphis R. R. Co.*, 15 Fed. Rep., 89, sec. 16, note.

This case simply holds that where a servant of the company commits a wrongful act or a trespass against a passenger, the grade or rank of the servant is immaterial.

Harris vs. *Louisville R. R. Co.*, 35 Fed. Rep., 121, is a case where the railroad company hired a detective agency to arrest one McCall, but through the stupidity of the agent the plaintiff Harris was arrested in his stead. He was arrested without warrant in a foreign State, and hurried off to jail and treated in a most outrageous manner, without the least observance of legal forms, and the Court very properly held that the defendant was liable. In this very case,

however, Judge Hammond recognizes the legality of the proceedings in this case, in the following language on page 119: "In such cases (where "arrest is made without warrant) it is the duty "of the arresting party to carry his prisoner im- "mediately before a magistrate of lawful com- "petency for that purpose, to accuse him there "according to the forms of law, and obtain "magisterial sanction for any further detention." All of which was done in the action now before the Court. Moreover, there is no doubt but the action in that case was for false imprisonment instead of the violation of a contract which forms the gravamen of this.

Wheeler vs. *Wheeler & Wilson M. Co.*, 59 Am. Repts., 574, was also an action for false imprisonment, where the general agent of the company secured the arrest of the plaintiff under circumstances of malice and fraud. The Court held that the malice of the agent was imputable to the company, and in that kind of an action the defendant was liable.

Williams vs. *Planters' Insurance Co.*, 34 Am. Repts., 494, was an action for malicious prosecution in which the Court properly held that the defendant was liable for such a prosecution upon the part of its agents, where

the facts set out in the complaint warrant such proceedings. The text-books cited, viz., Meecham on Agency, and Morawetz on Private Corporations, merely announce the doctrine, which we do not dispute, that a corporation is liable in actions of tort for the acts of its servants, either for assault and battery, false imprisonment, malicious prosecution, and other actions of a kindred nature; but our contention is that this action is not one of them, and hence this inquiry becomes unprofitable and altogether irrelevant. Counsel have quoted at some length from the opinions in the case of *Harris* vs. *R. R. Co.* and *Wheeler Manufacturing Co.* vs. *Boyce*, *supra*, and seem wedded to the conviction that these cases are in point, and support their theory in this case. Both of these actions were for false imprisonment, and the persistency of counsel in thrusting these authorities upon us and the Court suggests the inquiry: Is this in fact an action for false imprisonment, or can it, by any rational system of pleading under the code or at common law, be tortured into such an action? To show that such a contention is positively erroneous, we quote from the complaint:

"That on the 11th day of December, A. D. 1888,
"the defendant Southern Pacific Railroad Company,

" in consideration of the sum of sixty-four dollars paid
" to it by plaintiff therefor, undertook and agreed as
" such common carrier to safely transport and convey
" the plaintiff from the city of Omaha, Nebraska, to
" the city of San Diego, California, as a passenger,
" and the plaintiff thereupon entered one of the cars
" of the regular passenger train of the defendant for
" the purpose of being safely transported and carried
" by defendant from the said city of Ogden, Territory
" of Utah, to the said city of Sacramento, State of
" California, and that he entered upon and into said car
" by reason of his payment for and possession of his
" said ticket therefor, and with the knowledge and
" consent of defendant, and then and there became
" and was a passenger on board the said car and train
" of defendant.

" That at the time mentioned, soon after plaintiff
" had so entered into and upon said car and train of
" defendant, the conductor of said train and car, then
" working, ordering and conducting the same, and
" then and there being the agent and employee of
" defendant, under the order and instruction of defen-
" dant, greatly harassed, disturbed and insulted said
" plaintiff by denying his right to be transported and
" conveyed to his said destination according to his
" right.

" That these acts of the agent of defendant, whose
" name is unknown to plaintiff, were had and done at
" unreasonable hours of the night as well as during
" the day, and in presence of a multitude of people,
" greatly to the shame, disgrace and indignity of
" plaintiff, and such acts were without cause and had
" forcibly, willfully, maliciously, scandalously and
" contemptuously as against this plaintiff.

" That said acts consisted principally of the open " assertion that the plaintiff had no right and no " ticket for transportation as aforesaid, and were ac- " companied by an assault of the character aforesaid " in and upon the person of plaintiff, committed by " said agent of defendant.

" That said acts above complained of as against the " plaintiff were by said agent of defendant carried on " continuously until the train of defendant, being still " running, the town of Rye Patch, Humboldt county, " Nevada, was reached, when the said agent of de- " fendant, continuing the said wrongful, unlawful, " willful and malicious conduct as aforesaid, procured " the assistance of one other man whose name is un- " known to plaintiff, and while plaintiff was seated " in said car and train, according to his right, the " said agent and his assistant as aforesaid did, with " force and arms, commit an assault in and upon the " person of plaintiff, and did then and there, at the " time and place aforesaid, attempt to unlawfully and " forcibly eject this plaintiff from said car and train, " where he had a right, by reason of the facts afore- " said, so to be.

" That the said agent and agents of defendant, " continuing the said wrongful, unlawful, forcible, " willful and malicious acts above complained of, and " when said train had reached the town of Lovelock, " Humboldt county, Nevada, and by order of defen- " dant did procure the assistance of two other men " heavily armed, whose names are unknown to plain- " tiff, who did, at the same place and on or about the " 24th day of January, 1889, enter into and upon " said car, and by force and intimidation and with " arms did remove, eject and drive this plaintiff from

" and off said car and train in irons, and did convey " him to the common jail of said town and county, " all of which acts were had and done by the agents " of defendant under the order of defendant in pres- " ence of a multitude of people, forcibly, willfully, " maliciously, scandalously and contemptuously, to " the great shame, scandal, disgrace, indignity and " damage of this plaintiff, and did then and there " willfully and maliciously assault said plaintiff, and " then and there grossly neglected and treated with " wanton contempt the rights of this plaintiff above " written."

The foregoing are all of the allegations of the complaint, charging the plaintiff's cause of action.

Can there be any question in the mind of any person who reads this complaint, be he lawyer or layman, that the cause of action alleged is " that of being forcibly ejected from the car and " train of the defendant, where he claimed a " legal right to be by virtue of the ticket de- " scribed in the complaint?"

There is no allegation in the complaint that he was either arrested or imprisoned falsely or otherwise.

The gist of the complaint is, that he procured a ticket from the defendant which he had in his possession, and by virtue of the ticket was, rightfully and lawfully, upon its car and

train; and, while lawfully pursuing his journey thereon, he was wrongfully and unlawfully removed therefrom by the agents of the defendant to his damage in the sum of $100,000.

This was the action brought and tried in the lower court, without any amendment of the complaint, and it would seem novel, if not indeed preposterous, at this stage of the proceedings, to attempt to transform the action into one of false imprisonment or malicious prosecution, which counsel have almost exclusively and very ingeniously argued in their brief.

But we are admonished by the attorneys for the defendant in error that all forms of action are abolished by the Code, and hence the statement of the facts of a case is all that is now required, without reference to any particular name or form as required by the rules of the common law.

While this is true as to matter of form simply, the substance must yet be stated, the same as under the former system, by the statement of facts which show a right of action in the plaintiff, the nature of the grievance, the evidence required and the measure of relief.

As stated by Mr. Bliss in his work on Code Pleadings, sec. 6: "The whole case often clusters

" around the name, and the action is just as
" much an action of trover or of replevin or of
" ejectment as though so called in the plead-
" ings. When the statute says that there shall
" be one form of action, form and not substance
" is spoken of. Without classification there is
" no science. Such distinctions as exist, in the
" nature of things must be recognized, and they
" are equally recognized whether a specific name
" be given to the suit or action, with a cor-
" responding formula, or whether they arise
" from and are known only by the nature of the
" grievance and the character of the relief."

Bliss on Code Pleading, section 6.
Green, Practice and Pleading, sec. 5.

These propositions are so self-evident and universally recognized, that to simply state them is all that need be done, as no lawyer at this stage of our jurisprudence will have the temerity to dispute them.

For example, I wish to bring an action of ejectment; all forms of action being abolished, I am only required to state the substantial facts, which are my own possession, or right of possession, and entry and ouster by the defendant. The statement of these facts can never be

dispensed with, and they constitute an action of ejectment.

Again, malicious prosecution: the form is immaterial, but the substance must still be pleaded the same as at common law, which is that the defendant instituted against the plaintiff maliciously, and without probable cause, a prosecution which has terminated, whereby the plaintiff has been injured and damaged in a sum as specified in the complaint. The lawyer in reading such a complaint will know at once from these facts that the action is one for malicious prosecution, equally under the code as at common law, and unless these facts are stated in this class of actions the complaint will not state a cause of action.

Stewart vs. *Sonneborn*, 98 U. S., 195.

So, in an action for false imprisonment, the complaint under the code must allege that the defendant imprisoned the plaintiff against his will and without authority of law.

American and English Encyclopedia of Law, Vol. 7, page 686.

Painter vs. *Ives*, 4 Neb., 122.

Deusenbury vs. *Kiely*, 8 Daly (N. Y.), 537.

Shaw v. *Jayne*, 4 Howard (N. Y.), 119.

It is therefore submitted, that neither under the code nor at common law can the complaint in this case be construed to be one for false imprisonment or malicious prosecution, and therefore the arguments of counsel and the authorities cited directed to these propositions are without force and have no application.

Counsel are also in error when they assert that the trial court held or decided that the complaint was sufficient for either of these causes of action, as there was no pretense in that court that this action was any other than one for the violation of a contract of carriage, and the whole controversy centered upon the sufficiency of the ticket to entitle the plaintiff to be carried; in which, after days of argument and the marshaling and submission of all the authorities, the Court held "the ticket was not such as the defendant was bound to honor," and it was therefore justified in removing the plaintiff from the train, using no unnecessary force for that purpose.

See instructions, Trans., p. 73.

The statements in the brief of counsel on pages 28 and 29, that "Hamilton did not invite a wrong, and that he did not resist for any other reason than that he wanted to proceed on his journey," are neither plausible nor ingenious.

That he did resist, and that, too, with a drawn six-shooter, is admitted. His reasons for doing this, as stated by counsel, "that he wanted to proceed upon his journey," must appear wholly immaterial here, the Court having decided, and so instructed the jury, that he was not entitled to remain on the train, and the defendant was justified in expelling him. Neither does it very satisfactorily or clearly appear from the evidence, that he was anxious to proceed with haste, because the only demand made by any conductor was that he should either sign his ticket, pay his fare or leave the train. Hence, the signing of his ticket, which was a simple act and one easy to be accomplished, would have avoided the whole difficulty. He chose, however, to be obdurate, and although unquestionably in the wrong, he forced the conflict, and by the use of a deadly weapon drove the conductor and train agents from the car, and with his pistol in his belt was complete master of the situation.

Is it not true then that he did invite a wrong? The right to ride and the right of expulsion could not both exist at the same time. "He did not have the right to ride," says the Court in its instructions to the jury; hence his attempt to ride was wrongful; his assault with a pistol was

criminal, for which he was properly arrested. The argument that the complaint that was at once filed against him, and upon which he was prosecuted, was an afterthought, is little less absurd than the matter which precedes it. Unless it be true that the agents and officers of a railroad company in the orderly conduct of its business have no rights which the public are bound to respect, and are a prey to the ruffianly assaults of every evil-minded person who may seek by the aid of a revolver to transport himself over the road; that the criminal laws of the land for the suppression of crime were not designed to afford them protection as well as every other law-abiding citizen,—then we submit that, under the confession of Hamilton on the witness stand in this case, he was clearly guilty of a felonious assault, and should have been made to suffer the penalty of his crime by a proper conviction under the charge laid.

What does it matter that a justice of the peace at Lovelock decided that the ticket was good, and that Hamilton was justified in defending his position upon the train under it at the point of a pistol? The Judge who tried this case decided otherwise: that the ticket was not good, and that the plaintiff was not justified in attempting to

travel upon it, and that he could not be permitted "to invite a wrong and then complain of it." All of which he has been permitted to do, and is still here presisting in the effort.

"But," counsel inquire, "upon which of the "grounds mentioned in the statute was Hamilton "arrested? It must have been the fourth. If so, "the arrest was unlawful." The fourth subdivision of the Nevada statute permitting arrests without warrant reads as follows:

"4.—On a charge made upon reasonable cause "of the commission of a felony by the party ar- "rested."

Counsel assert "that the cause here was not reasonable." That was for the officer to judge after the statement of the facts by the person complaining.

See authorities cited *supra*.

If an officer has a right to arrest a person without a warrant, under the Nevada statute, upon a charge made upon reasonable cause of the commission of a felony, then he must necessarily be invested with the discretion of judging of the reasonableness of the cause, and having exercised his judgment in that respect, and made the arrest, in

the light of said authorities, the person complaining is not liable; the jurisdictional fact is, the right to judge of the reasonableness of the cause.

Longford vs. *Boston & A. R. R*, 144 Mass., 431.
Barker vs. *Stetson*, 7 Gray, 53.
Rohan vs. *Sawin*, 5 Cush., 285, 286.

Neither can we be charged with the manner of making the arrest, as that was also a matter resting in the discretion of the officer, and over which the defendant could have no control.

Much stress is laid upon the language employed by the conductor, that he wanted Hamilton taken off, etc.; this, indeed, is all the conductor could ask if Hamilton had committed a murder.

He telegraphed to his superintendent that a man had pulled a pistol on him, a six-shooter, and he wanted him taken off. He stated to the officer substantially the same thing; the charge was immediately preferred against Hamilton as soon as the justice could be reached, and everything connected with his arrest and prosecution was in strict conformity with the law, and amply justified by the facts, and the criticism upon the expressions used by the conductor or agents

of the defendant is, to say the least, decidedly gauzy.

We do not desire to follow counsel in the discussion of the rights of a passenger and a railroad company under tickets generally, nor even the ticket presented by the plaintiff in this action, for the reason that the law regulating this matter was laid down to the jury by the instructions of the Court, and, as we have shown in our former brief, was binding upon them. If the plaintiff was dissatisfied with these instructions, he should have excepted to them and prosecuted his writ of error here; not having done so, they became the law of the case, and are not now open to attack on the part of the plaintiff.

We submit, therefore, that the position which we assumed in our former brief, wherein we attempted to fully and fairly present this case upon the law and the evidence, remains wholly unshaken. The arguments of counsel, it seems to us, have signally failed to cast even a suspicion or shadow against our contentions here; and having an abiding faith that justice will finally prevail, and that the majesty of the law, which, like the dews from heaven, "should fall alike "upon the rich and the poor, the just and the

" unjust," will be here maintained, where neither prejudice, ignorance nor caprice will intervene to defeat justice, we most respectfully submit this cause to the Court.

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